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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 451

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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Petitioner, The Pennsylvania Railroad Company, prays that a Writ of Certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

OPINION BELOW

The Court of Claims delivered no opinion. Its order directing the entry of judgment is unreported. It appears as an Appendix hereto, at page 1a, *infra*.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1959. On August 21, 1959, the time to file a

petition for writ of certiorari was extended by order of Mr. Justice Stewart to and including October 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Is an order of the Interstate Commerce Commission, entered in a proceeding had on referral from the Court of Claims, declaring certain rates of a common carrier by rail to have been unreasonably high as applied to past shipments a judicially reviewable "order" within the meaning of 28 U.S.C. § 1336 and 49 U.S.C. § 17(9), when the legal consequence of the order is finally to relieve a shipper of its obligation to pay the carrier for past transportation services charges computed on the basis of those rates?

STATUTES INVOLVED

This case involves primarily Sections 1336 and 1398 of the Judicial Code, and Section 17(9) of the Interstate Commerce Act. These provisions read as follows:

28 U.S.C. § 1336.

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

49 U.S.C. § 17(9).

> "When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been

made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

28 U.S.C. § 1398.

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

STATEMENT

The result of the Court of Claims decision in this case is that petitioner's claim against the United States for freight charges has been forever foreclosed by an administrative order the lawfulness of which petitioner has never been permitted to challenge in any court.

Petitioner is a common carrier by rail and is subject to the regulatory provisions of Part I of the Interstate Commerce Act. 49 U.S.C. § 1 *et seq.* In 1941 and 1942 petitioner transported for the United States certain shipments of iron and steel articles. The shipments were intended for export through the port of New York but were not there exported due to war conditions. Two sets of rates then filed and effective were potentially applicable to the shipments in question; a lower "export rate" and a higher "domestic rate".

The United States was billed, and made payment, on the basis of the domestic rate. Subsequently, purporting to act pursuant to § 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U.S.C. § 66, the United States deducted from other freight charges due petitioner the difference between the export rate and the domestic rate as to each of the shipments, taking the position that although the domestic rate was applicable to the shipments it was unreasonable insofar as it exceeded the export rate.

Petitioner sued in the Court of Claims, 28 U.S.C. § 1491, seeking to recover this difference, which amounted to $7,237.87. After trial to a Commissioner and argument before the Court of Claims, that Court held on April 3, 1957 that the doctrine of primary jurisdiction required it to suspend the proceedings before it "pending a determination by the Interstate Commerce Commission as to the proper charges to be applied to the shipments . . ."

In accordance with this order of suspension, the United States on May 28, 1957 filed in the Interstate Commerce Commission a petition of referral. ICC Dkt. No. 32187. The case was heard by an Examiner, who on May 5, 1958 issued a proposed report finding that the domestic rate was reasonable as to 12 of the 75 shipments involved but as to the remaining 63 was unreasonable insofar as it exceeded the export rate. Petitioner's exceptions to the proposed report were overruled by Division II of the Commission on November 12, 1958, and petitioner's petition for reconsideration by the entire Commission was denied on March 4, 1959.

On March 23, 1959 the United States filed in the Court of Claims a motion to vacate the order of suspension and for judgment for petitioner in the amount of $1,663.39, the portion of the total recovery sought found by the Commission to have represented reasonable charges. Petitioner opposed this motion, asking that the suspension of proceedings in the Court of Claims be continued until petitioner had had an opportunity to file and have determined, in the appropriate District Court, a complaint seeking to set aside and annul the order of the Interstate Commerce Commission. On April 3, 1959, petitioner filed such a complaint in the District Court for the Eastern District of Pennsylvania, invoking the jurisdiction of that Court under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9).[1]

The United States opposed petitioner's motion further to stay the Court of Claims proceeding, urging that the order of the Interstate Commerce Commission upon which it relied in its motion for entry of judgment was not reviewable under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9) because not in fact an "order" but rather merely an "ancillary step" in a judicial proceeding, and that therefore there was no occasion further to delay the entry of judgment.

On June 5, 1959, the Court of Claims issued an order granting the motion of the United States to

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[1] The case was brought in that judicial district because of the venue requirements of 28 U.S.C. § 1398. It was brought before a single-judge District Court. See United States v. Interstate Commerce Commission, 337 U.S. 426; Davidson Transfer & Storage Co. v. United States, 164 F. Supp. 571 (D. Md. 1958); Eastern Freight-Ways, Inc. v. United States, 170 F. Supp. 848 (D.N.J. 1959).

vacate the order of suspension, and directing the entry of judgment for petitioner in the amount of $1,663.39.[2]

REASONS FOR GRANTING THE WRIT

1. The action of the Court of Claims in entering judgment on the order of the Interstate Commerce Commission without affording petitioner the opportunity to seek review of the order, on the theory that the order is not judicially reviewable under 28 U.S.C. § 1336, is in direct conflict with the decision of this Court in *El Dorado Oil Works* v. *United States*, 328 U.S. 12, and unless promptly corrected by this Court will create doubt and confusion in an important area of federal law.

In *El Dorado* the Oil Works brought suit against General American Tank Car Corporation (Car Company), seeking to recover monies allegedly due it under a tank car rental agreement. Car Company defended on the ground that a making of the payments demanded would result in a violation of the Elkins Act. 49 U.S.C. 41. The District Court rendered judgment for Car Company, and the Court of Appeals reversed. 104 F.2d 903. This Court in turn reversed the Court of Appeals, and remanded the case with directions that the District Court should suspend the proceedings before it until the Interstate Commerce Commission had passed on the legality of the challenged past practices in proceedings had before the Commission pursuant to the remand. *General*

[2] The time for the United States and the Interstate Commerce Commission to answer the complaint in the Eastern District of Pennsylvania has been extended by agreement of the parties until after this case is finally determined. Should the judgment of the Court of Claims be permitted to stand, the Pennsylvania case will, of course, be altogether moot.

American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U.S. 422.

Oil Works thereupon sought in the Commission a declaratory order that payment to it by Car Company of the amounts due under the agreement sued on would not violate the Elkins Act or any other provision of the Interstate Commerce Act. The Commission, after hearing, issued a declaratory order holding that payment of the amount sued upon would "constitute a rebate and discrimination and involve a departure from the tariff rules applicable, prohibited by section 1 of the Elkins Act, and section 6(7) of the Interstate Commerce Act . . ." 328 U.S. at 18. It thereupon ordered that the proceeding before it be discontinued.

Oil Works sought review of this order in the District Court, which dismissed the complaint for lack of jurisdiction on the ground that the action of the Commission did not constitute a reviewable "order" within the meaning of 28 U.S.C. § 41(28) (now 28 U.S.C. § 1336). This Court reversed, pointing out that (328 U.S. at 18-19):

> "the Commission's findings and determination if upheld constitute far more than an 'abstract declaration'. *Rochester Telephone Corp.* v. *United States*, 397 U.S. 125, 143. 'Legal consequences' (*id.* at 132) would follow which would finally fix a 'right or obligation' (*id.* at 131) on appellants' part. These findings are more than a mere 'stage in an incomplete process of administrative adjudication,' for the Commission here has discontinued further proceedings. *Id.* at 143. We, therefore, think that the Commission's action falls within the class of 'orders' which *Rochester Telephone Corp.* v. *United States, supra*, held to be reviewable by a district court of three judges.

> The District Court erred in dismissing the complaint for want of jurisdiction."[3]

El Dorado plainly establishes that the action of the Interstate Commerce Commission in this case constitutes an "order" of which review may properly be had under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9), subject to the venue requirements of 28 U.S.C. § 1398. As in *El Dorado*, the proceedings before the Commission in this case was had on referral from a federal court which suspended proceeding before it pending determination of the issue referred. As in *El Dorado*, the order of the Commission was declaratory in form. As in *El Dorado*, the issue referred to and determined by the Commission controls the outcome of the court litigation. As in *El Dorado*, the issue referred concerned a dispute between the parties as to the legality of past practices of a carrier, first raised as a defense to a suit in the courts for monetary recovery. And as in *El Dorado*, the order of the Commission, unless overturned on review, has "legal consequences" which finally fix a "right or obligation". Under these circumstances petitioner believes that the decision of the Court of Claims is plainly contrary to a controlling decision of this Court, and for that reason merits review by this Court.

The decision below appears to be contrary to *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, where this Court held that an order of the Commission denying reparations to a shipper was reviewable by a single-judge District Court under 28 U.S.C. § 1336, and to *Frozen Food Express* v. *United States*, 351 U.S. 40.

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[3] As to whether a three-judge District Court or a single judge should review the order in this case, see Note 1, supra.

Furthermore, the decision below is in direct conflict with *Davidson Transfer & Storage Co.* v. *United States,* 164 F. Supp. 571, a case virtually identical with the present one on its facts. It was there held that an order of the Commission of precisely the kind here involved was subject to judicial review in accordance with the procedures set forth in 28 U.S.C. § 1336, subject to the venue requirements of 28 U.S.C. § 1398.

2. The decision below warrants review because it is evident that despite *El Dorado* some confusion exists on the part of the United States as to the rule properly to be applied in proceedings of this kind. The United States, respondent here, has in the past asserted and is at the present time asserting in other litigation precisely the position which petitioner unsuccessfully urged before the Court of Claims, and which is diametrically opposed to that taken by the United States in this case. In *Davidson Transfer & Storage Co.* v. *United States, supra,* the United States successfully argued that a declaratory order of the Interstate Commerce Commission declaring past carrier rates to have been unreasonable was reviewable under 28 U.S.C. § 1336. And in *United States* v. *Interstate Commerce Commission,* No. 1057-58, now pending in the District Court for the District of Columbia, the United States has filed suit to review a Commission order, relating to the interpretation of a tariff, which was entered on referral from the District Court for Minnesota, and is relying on 28 U.S.C. § 1336 as the basis for invoking the jurisdiction of the District Court for the District of Columbia.

Since the United States is by statute made a party to many actions brought to review orders of the Commission, 28 U.S.C. § 2323, it has been and frequently

will be called upon to take a position regarding the issue as to which review is here sought. In the interest of sound judicial administration and fairness to private litigants, it is imperative that the principles so clearly enunciated in *El Dorado* be reaffirmed by this Court in order that the United States may not, when it serves its monetary interest to do so, urge and benefit from a rule the exact converse of that which it has successfully pressed in other suits seeking to annul or set aside orders of the Commission.

3. The present case forcefully illustrates the consequences of a holding that an order of the Interstate Commerce Commission of the kind here involved is not subject to judicial review under 28 U.S.C. § 1336. If it cannot be so reviewed, then it is altogether unreviewable, for it is well settled that the Court of Claims has no jurisdiction to review or set aside orders of the Commission. *United States* v. *Jones*, 336 U.S. 641. Thus if the decision of the Court of Claims in this case is permitted to stand petitioner's rights and obligations have been finally fixed by an administrative order which was never subject to any judicial review.

There is nothing in the statutory scheme provided by Congress which suggests that such a result was intended. Had the United States in this case been in the position of a private litigant, and thus been unable to invoke § 322 of the Transportation Act of 1940 to withhold from sums concededly due petitioner on account of unrelated transactions an amount equal to the allegedly unreasonable element of the charges here involved, this suit would doubtless have arisen as an action by the United States before the Interstate Commerce Commission for reparations. Any order entered in such an action is reviewable in the District Courts. See *United States* v. *Interstate Commerce*

Commission, 337 U.S. 426. The order of the Commission in this case has substantially the same consequences as an order entered in an action for reparations. It no less than the latter type of order is wholly ripe for judicial review.

CONCLUSION

Recent decisions of this Court have made it inevitable that the suspension of proceedings brought in the courts which turn on issues within the primary jurisdiction of the Interstate Commerce Commission, and the referral of those issues to the Commission, will become an increasingly familiar practice. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59; *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411. Thus the question of the reviewability of administrative orders entered on such referrals will frequently arise and the decision below, unless promptly corrected by this Court, will create doubt and confusion as to the proper resolution of that question.

Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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